Supreme Court, U. S.
FILED
MAY 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

UNITED STATES SUPREME COURT

RAYMOND L. SCHARF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

NO. 76-1611

PETITION FOR WRIT OF CERTIORARI

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Now comes Petitioner, RAYMOND L. SCHARF, by Counsel to respectfully petition this Court for Certiorari.

OPINION BELOW

On March 30, 1977, the Court of Appeals for the Eighth Circuit issued its opinion in this case, CR77-1055.

A copy of that decision is affixed as Appendix, Part E.

JURISDICTIONAL STATEMENT

On April 19, 1977, the United States Court of Appeals for the Eighth Circuit denied petition for rehearing or hearing En Banc in this matter. On May 2, 1977, that Court denied a motion for stay and remanded to the United States District Court for the Eastern District of Missouri for evidentiary hearing. Copies of these Orders are affixed as Appendix Part F, G, and H.

Review of the denial of petitioner's request to plead anew and the order requiring evidentiary hearing is sought herein pursuant to 18, United States Code, § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Appeals for the Eighth Circuit have the power to take for itself the rulemaking power of the Supreme Court and the Congress of the United States

by creating a hearing to supplement a record adjudged violative of Rule 11, Federal Rules of Criminal Procedure, in direct contravention to Rules previously made by this Court and Congress and, further, to delegate such power to a United States District Court?

2. When the Supreme Court and the Congress expanded Rule 11, Federal Rules of Criminal Procedure, by incorporating prior case law therein, did the Congress and the United States Supreme Court thereby free Trial Courts from the necessity of strict compliance with Rule 11, and the requirements of the prior case law?

3. May a challenged plea of guilty stand, absent an affirmative showing in the record of substantial compliance with each and every relevant subsection of Rule 11, Federal Rules of Criminal Procedure?

4. May a record deemed insufficient

under Rule 11, Federal Rules of Criminal Procedure, be remanded for Ad hoc evidentiary hearing?

5. May a Court of Appeals remand a criminal case for hearing not presently existing in law without specification of standards to govern such hearing?

RULES INVOLVED

Rule 11 and Rule 32 (d) of the Federal Rules of Criminal Procedure are involved in this case. The full text of these Rules is set forth as Appendix, Part I.

STATEMENT OF THE CASE

On September 20, 1976, defendant Raymond L. Scharf, entered a plea of guilty to one count of a seven count indictment alleging a violation of 18 U.S.C. § 1951. The Government, at that time, sought dismissal of the indictment's remaining six counts. At that

time the Government informed the Court that it sought such dismissals "in the interest of justice". (See Appendix Part A.) Subsequently the parties filed Affidavits showing that the request for dismissals constituted compliance in part with a plea bargain negotiated by the attorneys for the parties. (See Appendix J and K). Defendant contends that that agreement has never been honored by the Government.

Defendant was convicted pursuant to the arraignment and plea bargain. On the 22nd day of October, 1976, he was sentenced to ten years imprisonment. (See Appendix Part B).

Defendant, in timely fashion brought a motion pursuant to Rule 32 (d), Federal Rules of Criminal Procedure, requesting leave to withdraw the plea, contending that the Trial Court failed to ascertain on the record whether or not the defendant understood:

(a) The nature of the charge against him;

(b) That the sworn statement taken at the hearing could be used against the defendant in a prosecution for false statement;

(c) That he had a right to persist in his plea of not guilty;

(d) That he had the right to cross-examine witnesses against him;

(e) That he could not be compelled to incriminate himself;

(f) That upon his plea of guilty there would be no further trial and that his plea constituted a waiver of trial;

(g) That if he were to plead guilty, the Court could ask him questions about the offense;

Further, it was shown that the Trial Court had not elicited a factual basis for the plea which violated Rule 11 (f), Federal Rules of Criminal Procedure. In addition, the motion demonstrated non-compliance with Rule 11 (d) and 11 (e) of the Federal Rules of Criminal Procedure. Moreoever, defendant contended that the Government's failure to honor the

plea bargain violated the doctrines of SantoBello v. New York, 404 U.S. 257, 30 L. Ed. 2d. 427 (1971) (See Appendix Part C).

The motion was denied by the Trial Court. (See Appendix Part D.). Appeal was duly taken to the Court of Appeals for the Eighth Circuit. On March 30, 1977, that Court issued the opinion herein which:

(1) Found that the Trial Court had made "adequate" compliance with Rule 11 (c) and Rule 11 (f), Federal Rules of Criminal Procedure;

(2) Found that Rule 11 (d) and 11 (e), Federal Rules of Criminal Procedure had been violated by the Trial Court; and

(3) Ordered the case remanded to the Trial Court to hold an evidentiary hearing and determine;

(a) the terms of the plea bargain;

(b) whether the bargain was breached; and

(c) whether manifest injustice would result from allowing the conviction to stand. (See Appendix Part E).

Motion for re-hearing and Petition for Hearing En Banc was filed and denied. (See Appendix Part F.). Motion for Stay of Mandate Pursuant to Rule 41, Federal Rules of Appellate Procedure, was filed and denied. Mandate issued under date of May 2, 1977. (See Appendix Part G.).

ARGUMENT

IMPORTANCE OF THE ISSUES PRESENTED

I. THE COURT SHOULD TAKE JURISDICTION OF THE CASE HEREIN BECAUSE OF THE IMPORTANCE OF THE QUESTIONS POSED TO THE ORDERLY ADMINISTRATION OF CRIMINAL JUSTICE.

From a "systems" standpoint, the most important single phase in the administration of criminal justice is adjudication of guilt pursuant to a plea of guilty or Nolo Contendere. If such determinations are inadequate the system fails in its function to maintain order through the belief of the average citizen in the fundamental credibility and fairness of the criminal law. If the use of such procedure is reduced, the system is crushed by the huge volume of contested litigation fed into the process.

The process of adjudication of guilt presently requires the creation of a record

of proceedings which sets forth the minimum quantum of knowledge possessed by the Trial Court immediately prior to the finding of guilt. The Court's action is not automatic. Rather it is based upon an exercise in judgment as to the acceptability of the plea, the plea bargain, if any, and the defendant's ability to participate in the system free from debilitating physical and mental handicaps with sufficient knowledge and mental capacity to make the decisions essential to a knowing and voluntary plea. The Trial Court must also examine the efficacy of the Government's activities prior to the offering of the plea. That determination is especially sensitive, where there is a direct causal relationship between governmental conduct and the plea. In the last decade, guilty pleas have been regulated by Rule 11; Federal Rules of Criminal Procedure, McCarthy v. United States, 394 U.S. 459, 22 L. Ed. 2d 418 (1969), and

Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d. 274 (1969). Rule 11 was modified in 1975 by its expansion to include those requirements previously contained in McCarthy (supra) and Boykin (supra), and a section requiring the Trial Court to regulate and evaluate plea bargaining pursuant to the precepts of SantoBello v. New York, 404 U.S. 257, 30 L. Ed. 2d. 427 (1971).

The Government now argues in some courts that, by the expansion of Rule 11, this Court and the Congress of the United States down grades the requirements of prior case law to mere option. This argument was rejected in the Second Circuit, United States v. Journet, 544 F. 2d. 633 (C.A. 2nd, 1976); partially accepted in the District of Columbia Circuit, United States v. Watson, 548 F. 2d. 1058 (1977); and accepted in full by the Eighth Circuit in the instant case.

At this juncture, it is fair to say that Rule 11, Federal Rules of Criminal Procedure, the keystone to the criminal justice system, is eroding and for 80% of the criminal case workload of America's Federal judiciary referred to in Halliday v. United States, 394 U.S 831, 23 L.Ed 2d. 16, (1969), the finality of guilt adjudication rests more upon the geographical site of the taking of the plea than the record of proceedings, or the substantive conduct of the Court and parties.

II. THIS COURT SHOULD TAKE JURISDICTION PURSUANT TO THE REASONS SET FORTH IN RULE 19, RULES OF THE UNITED STATES SUPREME COURT, IN THAT A COURT OF APPEALS HAD DECIDED A FEDERAL QUESTION IN CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

In 1969, this Court specifically held;

> "We hold that a defendant is entitled to plead anew if a United States District Court accepts his guilty plea without fully adhering to the procedures provided for in Rule 11." McCarthy v.

United States, 22 L. Ed. 2d, 425. (emphasis added).

In 1977, the Eighth Circuit held in the case at bar:

> "It is unfortunate that the District Court did not comply more fully than it did with Rule 11 (d) and (e). It is settled in this Circuit, however, that not every failure of a District Court to comply with the Rule entails the setting aside of a conviction with leave to withdraw a plea of guilty..." In the instant case, Slip Opinion p. 12, Appendix, Part E. (emphasis added).

This Court has held:

> "Rule 11 is designed to eliminate any need to resort to a later fact finding proceeding. McCarthy v. United States, 22 L. Ed. 2d. 427."

The Eighth Circuit remanded however for the following purpose (To):

> "hold an evidentiary hearing to determine what the terms of the plea bargain were and whether the bargain was breached and whether manifest injustice will result if the conviction based on the guilty plea is permitted to stand...." Slip Opinion pp. 13, 14, Appendix E.

III. THIS COURT SHOULD TAKE JURISDICTION PURSUANT TO THE REASONS SET FORTH IN RULE 19, RULES OF THE UNITED STATES SUPREME COURT, IN THAT A COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

At present, seven circuits adhere to McCarthy, (supra) and its strict interpretation of Rule 11, Federal Rules of Criminal Procedure, while four Circuits either follow a different doctrine or equivocate in their application of McCarthy (supra). The following chart shows that distribution.

Those Circuits which adhere to the application of McCarthy, (supra)

1. FIRST CIRCUIT:

   United States v. Yazbeck
   524 F. 2d 641 (1975)

2. SECOND CIRCUIT:

   United States v. Journet
   544 F. 2d 633 (1976)

3. THIRD CIRCUIT:

   United States v. Crusco
   536 F. 2d 21 (1976)

United States v. Cantor
469 F. 2d 435 (1972)

4. FOURTH CIRCUIT

United States v. Boone
543 F. 2d 1090 (1976)

5. FIFTH CIRCUIT:

United States v. Narisi
538 F. 2d 1213 (1976)
United States v. Price
538 F 2d 722 (1976)

6. SIXTH CIRCUIT:

Phillips v. United States
519 F. 2d 483 (1975)
United States v. Wolak
510 F. 2d 164 (1975)

7. NINTH CIRCUIT:

United States v. Harris
534 F. 2d. 141 (1976)

Those Circuits which reject or are waivering in the application of McCarthy (supra).

1. EIGHTH CIRCUIT:

The instant case.

2. DISTRICT OF COLUMBIA CIRCUIT:

United States v. Watson
548 F. 2d 1058 (1977)

3. SEVENTH CIRCUIT:

Gates v. United States
515 F. 2d 73 (1975)

4. TENTH CIRCUIT:

United States v. Davis
544 F. 2d 1056 (1976)

WHEREFORE, it is respectfully requested that this Court issue its writ of CERTIORARI herein.

Respectfully submitted,

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